Public Prosecutor v Abdul Malik bin Marahaji & Anor

HIGH COURT (TAWAU) — CRIMINAL APPEAL NO T(42)-3 OF 1994
IAN CHIN J
26 APRIL 1994

Criminal Law *— Corruption — Complainant did not have valid travel documents — Accused police officers were not given duty of checking passports — Whether accused must be on 'official duty' before they could be guilty of offence under s 4(a) of the Prevention of Corruption Act 1961 — Prevention of Corruption Act 1961 s 4(a)*

The two accused were charged with an offence under s 4(a) of the Prevention of Corruption Act 1961 ('the Act') for accepting a bribe to refrain from acting against the complainant, who did not have a valid travel document legalizing her stay in Malaysia. The session court judge acquitted the accused as he was of the opinion that what the two accused did, ie checking passports, could not be regarded as their official duties because there was no operation at that time to ferret out illegal immigrants and the two accused were also not ordered by their superiors to carry out the task of checking passports. The public prosecutor has appealed against the acquittal.

Held, allowing the appeal:

(1) Words like 'official act' and 'official functions' were absent from s 4(a) of the Act and therefore, it was not a requirement that the two accused must be on official duty before they could be guilty of the offence under s 4(a) of the Act. It does not even matter if the two accused had been off-duty. Neither was it necessary that they must be acting on the instruction of their superiors as they were duty bound under the Police Act 1967, the Criminal Procedure Code (FMS Cap 6) and the Immigration Act 1959/1963 to arrest the complainant.

(2) The sessions court judge was therefore wrong in coming to the conclusion that the presumption of s 14 of the Act had been rebutted because the two accused were not doing anything connected with their official duties. The acquittal was accordingly set aside and the two accused were convicted of the offence charged.

[Bahasa Malaysia summary

Kedua-dua tertuduh telah didakwa atas suatu kesalahan di bawah s 4(a) Akta Pencegah Rasuah 1961 ('Akta itu') kerana telah menerima suatu sogokan daripada pengadu supaya tidak mengambil tindakan terhadapnya, kerana beliau tidak mempunyai dokumen perjalanan yang sah yang membenarkan beliau tinggal di Malaysia secara sah. Hakim mahkamah sesyen telah membebaskan tertuduh kerana beliau berpendapat bahawa apa yang dilakukan oleh tertuduh, iaitu memeriksa

A pasport, tidak boleh dianggap sebagai tugas rasmi mereka kerana tidak terdapat operasi untuk mencari pendatang haram pada masa itu dan tertuduh juga tidak diperintahkan oleh ketua mereka untuk menjalankan tugas memeriksa pasport. Pendakwa raya telah membuat rayuan terhadap pembebasan itu.

B **Diputuskan**, membenarkan rayuan itu:

(1) Perkataan seperti 'official act' dan 'official functions' tidak hadir dalam s 4(a) Akta itu, dan oleh itu, tidak menjadi suatu keperluan bahawa kedua-dua tertuduh itu semestinya sedang menjalankan suatu tugas rasmi sebelum mereka boleh didapati bersalah atas
C suatu kesalahan dibawah s 4(a) Akta itu. Ia juga tidak penting jika kedua-dua tertuduh tidak bertugas pada masa itu. Mereka juga tidak perlu bertindak atas arahan ketua mereka kerana mereka mempunyai kewajipan untuk menangkap pengadu di bawah Akta Polis 1967, Kanun Acara Jenayah (FMS Bab 6) dan Akta Imigresen 1959/1963.

D (2) Oleh itu, hakim mahkamah sesyen telah membuat kesilapan apabila membuat keputusan bahawa anggapan di bawah s 14 Akta itu telah dipatahkan kerana kedua-dua tertuduh tidak membuat apa-apa yang berkaitan dengan tugas rasmi mereka. Oleh itu, pembebasan itu diketepikan dan kedua-dua tertuduh itu disabit
E untuk kesalahan yang dipertuduhkan itu.]

Notes

For cases on an offence under s 4(a) of the Prevention of Corruption Act 1961, see 4 *Mallal's Digest* (4th Ed) paras 1604–1621.

F **Cases referred to**

1 *Ku Lip See v PP* [1982] 1 MLJ 194 (refd)
2 *Upendra Nath Chondhurry v Emperor* [1917] AIR 850 (distd)

Legislation referred to

G Prevention of Corruption Act 1961 s 4(a)
Penal Code (45 of 1860) s 161 [Ind]

Hassan Abdul Ghani (Deputy Public Prosecutor) for the appellant.
Both the accused in person.

H *Cur Adv Vult*

Ian Chin J: This is an appeal against the learned sessions judge's order of acquittal of two policemen, Abdul Malik bin Marahaji ('the first accused') and Mahamod bin Ulangkaya Bongsu ('the second accused'), made on
I 28 October 1991. The two accused were jointly charged, s 34 of the Penal Code (FMS Cap 45) being invoked, that they, on 26 February 1990, corruptly received RM100 to refrain from taking action against one Luisa bte Petrus ('PW1') for not having a valid travel document legalizing her stay

in Malaysia, which is an offence under s 4(a) of the Prevention of Corruption Act 1961 ('the Act'). The evidence of this case had been correctly set out by the learned sessions court judge in his judgment from which I will cite, and they are as follows. PW1 was asleep in her house on 26 February 1990 when at about 3.30am, both accused, together with another person who was the driver of a vehicle no SG 8959, came calling. They asked PW1 for her travel document and when the second accused discovered that PW1 had no valid document, he said to PW1 that she had to pay a fine or else she would be taken to the police station. PW1 then attempted to give RM20 to the second accused who did not accept it because the amount was not satisfactory and he demanded RM150. It was after this that PW1 went to her neighbour, Tajuddin bin Shukor ('PW2') and borrowed RM100 which she gave to the second accused who in turn handed the money to the first accused. The two accused then left in the car no SG 8959. PW2 confirmed that PW1 did on the said day and time take RM100 from him and had told him that it was for the police. Another witness, Udin bin Salleh ('PW3'), who was staying with PW2, confirmed the presence of the two accused and the said vehicle at the place and at about that time. A witness of the defence, one Sudirman bin Hj Ali ('DW7') confirmed the fact that the two accused were at about that time on the said day, not in their homes, but the two accused and their relatives gave evidence that they were at the relevant time at home. Since no notice was given as to this alibi evidence as required by s 420A of the Criminal Procedure Code (FMS Cap 6) ('the CPC'), this evidence, which tend to support alibi, must be excluded. See *Ku Lip See v PP*.[1] It was upon those evidence that I have just referred to, that the learned sessions court judge, though he said he was satisfied that the prosecution had proved that the two accused did in fact receive RM100 from PW1, came to the conclusion that the money was not received corruptly and that, therefore, the presumption of s 14 of the Act had been rebutted. Some of the prosecution witnesses had given evidence that it was not the duty of the two accused to check documents to see whether passes had been issued for people to remain in Sabah. According to these witnesses, the first accused was a marine policeman and that his duties were primarily performed on board boats at sea or at the dockyard after the boat had berthed, while the second accused was a member of the police field force and that the second accused was not at that time being assigned the duty of checking passports. The learned sessions court judge had relied on *Upendra Nath Chondhurry v Emperor*,[2] which held that:

> ... acceptance of money by a public servant a motive for showing disfavour to a person, not in the exercise of but entirely outside his official functions does not amount to an offence under s 161 ...

The learned sessions court judge then concluded that though the two accused may have committed another offence, they were not guilty of the offence under s 4(a) of the Act, because at the relevant time they were not on official duty and were not doing any official act. This was what the learned sessions court judge, after referring to the Police Act 1967, the CPC and the Immigration Act 1959/1963, said:

A ... Apa yang dapat dilihat di sini, selepas mengkaji akan perbuatan kedua-dua OKT serta melihat kepada peraturan undang-undang ini, jelas kepada kita bahawa kedua-dua OKT ini tidak menjalankan suatu tugas yang boleh dianggap sebagai tugas rasminya. Tiada apa-apa arahan diberikan oleh pegawai atasan kepada kedua-dua mereka untuk memeriksa pasport di tempat dan masa yang diperkatakan. OKT(1) bertugas di Cawangan Marin dan OKT(2) di Pasukan
B Polis Hutan yang mana bidang-tugas khusus mereka adalah jauh berbeza dari apa yang telah mereka lakukan. Seandainya kesalahan ini dilakukan di satu tempat 'check-point' atau pemeriksa polis di satu sekatan di jalanraya atau mereka adalah anggota polis tugas am kedudukan perkara mungkin berbeza. Tiada apa-apa operasi dijalankan oleh pihak polis di kawasan itu pada sekitar waktu itu ... Sudah pasti suatu pemeriksaan seperti ini bukan saja perlu
C dilaksanakan dalam bentuk satu operasi, malahan mestilah di dalam pengetahuan di samping arahan dari pihak atasan. Ini kesemuanya tidak ada ...

It would appear from the passage that I have just quoted that the learned sessions court judge was of the opinion that what the two accused did, that is the checking of passports, cannot be regarded as their official duties
D because there was no operation at that time to ferret out illegal immigrants and the two accused were also not ordered by their superiors to carry out the task of checking passports. On that basis and relying on *Upendra Nath Chondhurry v Emperor*,[2] which was a decision on s 161 of the Indian Penal Code and which the learned sessions court judge held to be in pari materia
E with s 4(a) of the Act, the learned sessions court judge acquitted the two accused. In order to appreciate the statement of law quoted and relied on by the learned sessions court judge, the facts of *Upendra Nath Chondhurry v Emperor*[2] had to be recounted and I can do no better than to cite the headnote and the relevant passages of that case, viz:

F Penal Code (45 of 1860) s 161 — Accepting money to do act outside official function is no offence — Constable accepting money to thrash person is not an offence under s 161. Where a head constable accepted two rupees on condition that he would send for and give a thrashing to a certain person:

Held: that he was not guilty of an offence under s 161 [of the Indian Penal Code].

G ...

Sanderson CJ — ... The offence with which he was charged was one under s 161 [of the Indian Penal Code], and in order to convict him of that offence, it must be proved that he accepted the two rupees

H 'as a motive or reward for doing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering, or attempting to render, any service or disservice to any person ...'

... the two rupees were given to the head constable not for the purpose of inducing him to do an official act or to show favour or disfavour to any person in his official capacity, but on the condition that the head constable would send
I for Madan's enemy and give him a thrashing. That cannot be said to be anything done by the head constable in his official capacity. It certainly would be showing disfavour to Madan's enemy but could not be showing disfavour in his official capacity. It would be doing something entirely outside his official functions ...

Is s 161 of the Indian Penal Code really in pari materia with s 4(a) of the Act? The said s 161 reads:

> Whoever, being or expecting to be a public servant, accepts or obtains, or agrees to accept, or attempts to obtain from any person for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act, or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rending or attempting to render any service or disservice to any person, with the Central or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government Company referred to in section 21, or with any public servant, as such, shall be punished with imprisonment of wither description for a term which may extend to three years, or with fine, or with both ...

Whereas s 4(a) of the Act reads:

> If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification as an inducement or reward for doing or forbearing to do, or for having after the coming into operation of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business, he shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding five years or to both.

Words like 'official act' and 'official functions' present in s 161 of the Indian Penal Code are absent from s 4(a) of the Act and therefore, the two sections cannot be said to be in pari materia. What the learned sessions court judge did was to read s 4(a) of our Act as imposing a condition that the two accused must be on official duty or must at least had been directed by their superior to check the complainant's travel documents before the two accused can be guilty of an offence under s 4(a) of the Act. Such a construction cannot be justified by the plain meaning of the words in s 4(a) of the Act. Though s 161 of the Indian Penal Code appears to require an accused person to be doing an 'official act' or exercising his 'official functions', those requirements are not present in s 4(a) of the Act. It is therefore not a requirement that the two accused must be on 'official duty' before they can be guilty of the offence under s 4(a) of the Act. I may add that it does not even matter if the two accused had been off-duty. Neither is it necessary, for the reason I shall state later, that they must be acting on the instruction of their superiors. In any event, the facts of *Upendra Nath Chondhurry v Emperor*[2] are entirely different from the facts of the present case. It will be recalled that in that case, a constable was asked to thrash someone in return for two rupees, which thrashing obviously cannot be regarded as the official act or function of a constable. But in the present case, the two accused came upon the complainant who had no valid travel document in which event, the two accused were empowered by s 20(3)(a) of the Police Act 1967, by s 23 of the CPC and s 51(3) of the Immigration Act 1959/1963 to arrest the complainant. The two accused were in fact duty bound to

A arrest the complainant without having to await for the orders of their superiors. They did not arrest the complainant and for that, they received RM100. Therefore, even if it can be read into s 4(a) of the Act that the two accused must be on official duties, a proposition which I do not agree with, the two accused were carrying out an official duty when checking the travel
B document of the complainant and the absence of orders from their superiors do not make their duty less of an official one. The learned sessions court judge is therefore clearly wrong in coming to the conclusion that the presumption of s 14 of the Act had been rebutted because the two accused were not doing anything connected with their official duties.

I have examined the evidence and I am satisfied that the evidence of the
C complainant were corroborated in the material aspects. The learned sessions court judge was, for the reasons stated above, wrong in acquitting the two accused. I therefore set aside the order of acquittal and instead convict the two accused of the offence charged. I will now hear the two accused before I pass sentence.

D *Appeal allowed.*

Reported by Jeanne Tan

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